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ABSTRACT

This booklet, which is intended for individuals involved in screening and selecting professionals and volunteers to work in programs serving young people, presents and examines guidelines that were developed jointly by the National School Safety Center (NSSC) and the Missing and Exploited Children Comprehensive Action Program (M/CAP). Chapter 1 emphasizes the importance of safeguarding children and outlines the objectives and activities of the M/CAP and NSSC. Discussed in chapter 2 are the following considerations in hiring: rationale for and limitations of background checks; costs of failure to screen potential employees thoroughly; development of effective personnel policies; aggressive screening; criminal background checks; creation of a spirit of cooperation; and obstacles impeding use of comprehensive record screening and background checks in schools and youth service agencies. Also included in chapter 2 are a screening policy statement, guidelines for screening and selecting employees and/or volunteers, and sample authorization and disclosure forms. Chapter 3 explains the tort of negligent hiring and considers the issues of conducting reasonable investigations and sovereign immunity. The good and bad news concerning record screening is summarized in chapter 4. Chapter 5 covers the policy intent of sex offender registration laws as well as their content and effectiveness. (MN)

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Hiring the right people

Guidelines for the Screening and Selection of Youth-Serving Professionals and Volunteers

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Hiring the Right People:

Guidelines for the

Selection and Screening of

Youth-Serving Professionals

and Volunteers

M/CAP

Missing and Exploited Children and Comprehensive Action Plan

NSSC

National School Safety Center

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Contents

	Foreword	5
Chapter 1	Safeguarding Our Children	7
Chapter 2	Hiring the Right People	11
Chapter 3	The Tort of Negligent Hiring	29
Chapter 4	Record Screening: Good and Bad News	35
Chapter 5	Sex offender registration	39

Foreword

No task is more important than selecting the right people. The quality of any organization, school or corporation is directly related to the individuals who deliver the services and provide the supervision and care that become a vital part of the organization.

Groups that serve children and youth have a responsibility to judiciously screen, carefully select and appropriately supervise their employees and volunteers. Organizations that have failed to live up to these expectations have become subject to lawsuits. The guidelines that follow were developed jointly by the National School Safety Center and the Missing and Exploited Children Comprehensive Action Program. They are offered here with our best wishes as we all work together to serve and protect our nation's most valuable and precious resource, our children.

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Chapter 1

Safeguarding our children

One of the most important decisions parents and communities make involves deciding who will teach, train, coach, counsel and lead our children when they are away from home. Keeping child molesters and pedophiles out of classrooms, schools and youth-serving organizations is a major task. Responsible parenting and thoughtful leadership should serve as a compelling motivation to establish reasonable safeguards for keeping child molesters away from our children.

Increasing litigation against school systems and child-care providers has created a financial reason to conduct appropriate background checks to protect the safety and well-being of children. School systems and youth service organizations around the country have already faced multimillion-dollar lawsuits for their failure to appropriately screen, properly supervise and remove employees who may cause a risk to the safety and well-being of children.

Every school system and youth-serving organization should have clear policy guidelines and procedures to weed out individuals who have had a criminal background of misbehavior involving children. Any records screening program must consider rights of privacy and due process as well as the right to a hearing when disqualification is involved. But the screening program must also balance these rights with the rights of the individuals who will be assisted by the youth-serving professional. This process should begin at the hiring phase to identify potential problem applicants. In addition, procedures should be set in place to appropriately monitor and respond to other problems that may emerge.

The National School Safety Center and the Missing & Exploited Children Comprehensive Action Program have collaborated to design and develop records screening procedures and practices for youth-serving professionals. The purpose of this effort has been to identify essential records screening components; to outline overall procedures for gathering, monitoring and maintaining data; and to identify due process and appeal guidelines for potential employees.

What is M/CAP?

The Missing and Exploited Children Comprehensive Action Program (M/CAP) is funded by the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention. The program is designed to help local communities develop effective multi-agency teams for handling child victim cases involving missing and exploited children. M/CAP helps local agencies establish and maintain these teams by providing ongoing training and technical assistance to build specialized skills.

M/CAP programs have been implemented nationally in selected local jurisdictions through the provision of training and technical assistance from the Public Administration Services in McLean, Virginia.

No two M/CAP sites are the same. Each site represents a variety of populations, resources and problems. Some communities already have a strong multidisciplinary program for child abuse victims. Rather than re-inventing or re-creating a new team or project, M/CAP assists the existing team to incorporate the issues of missing and exploited children into their program for child victims.

This practical approach recognizes the scarcity of resources and time facing agency personnel and seeks to avoid unnecessary duplication. It also recognizes that abducted and runaway children may not be the largest group of child victims in a community. Many children who are victimized, however, experience more than one type of victimization. Missing and exploited children are often already known to community agencies as victims. Runaway and abducted children may experience physical and sexual assault during their period away from home. Runaways often leave home to escape abuse. Children may become involved in sexual exploitation as a direct or indirect result of earlier victimization. The majority of family abduction cases involve families with histories of domestic violence.

Establishment of an M/CAP project site is a collaborative process beginning with detailed self-assessment. Community agencies are not required to allocate new or additional resources to the project, and the M/CAP project does not provide grant funds directly to participating jurisdictions for service delivery. The focus, instead, is on assisting these agencies to use their existing resources more effectively. Primary agencies participating in M/CAP include:

- law enforcement
- child protective services
- courts
- prosecutors
- schools
- mental health

- medical community
- nonprofit organizations

The composition and number of agencies that are involved in an M/CAP team will be determined by each individual community.

M/CAP has developed a number of special technical assistance projects designed to help local communities and agencies enhance their response to missing and exploited children, including a prototype for crimes-against-children crime analysis and an automated case management software program for multi-agency case and services management in child victim cases. A major goal of M/CAP involves the development of model protocols and tools for screening child-care and youth-service workers that can be adapted by child-serving agencies and organizations.

What is the National School Safety Center?

The National School Safety Center (NSSC) was created by presidential directive in 1984. NSSC represents a partnership of the U.S. Departments of Justice and Education and Pepperdine University. NSSC's national headquarters are in Westlake Village, California.

NSSC's mandate is to focus national attention on cooperative solutions to problems that disrupt the educational process. Special emphasis is placed on efforts to rid schools of crime, violence and drugs, and on programs to improve student discipline, attendance, achievement and school climate. NSSC provides technical assistance, offers legal and legislative aid, and produces publications and films. The Center also serves as a clearinghouse for current information on school safety issues.

The primary role of the National School Safety Center in this project has been to identify key legal issues and procedural strategies to assist schools and youth-serving agencies, particularly M/CAP teams, in developing appropriate record screening and employee selection strategies.

NSSC and M/CAP brought together a group of authorities from throughout the United States to help develop some comprehensive guidelines and procedures. This special monograph is a result of these efforts.

Chapter 2

Hiring the right people

Nowhere is there a clearer need for employment screening policies and procedures than in operations that serve children and youth. In recent years, reports of unscrupulous teachers and other youth-service providers have surfaced, attesting to the problem of child sexual abuse in schools and child-care facilities.

How do people get hired into positions that give them uncontrolled access to their prey? The answer lies either in the lack of effective screening policies and practices or in the failure of employers to comply with existing screening procedures.

Penn. State or state pen?

Can a school district or other child-service provider know what kind of record or background a potential employee has based solely on an application? Without thorough record screening and criminal history checks, how does a personnel officer know if the candidate is from a university training program or from a background that includes prison, parole or probation?

Background checks are costly. For school systems and other agencies to adequately perform criminal background checks and record screening requires commitment, effort and resources. But it also requires tremendous resources to launch an investigation and, if necessary, discipline or dismiss an errant employee. And, if the employer is found negligent in hiring or retaining a child molester, the cost of a liability suit is much higher yet. The concept is similar to the television commercial that asserts, "You can pay me now, or you can pay me later."

Escaping detection

Employees who abuse children entrusted to their care may escape discipline or even detection for a variety of reasons. Many of these reasons are related to the

high costs of litigation and adverse publicity as well as the highly sensitive nature of the offense. It is often easier for everyone involved for the perpetrator to quietly move on without prosecution. Unfortunately, he or she is likely to commit the offense again in another location.

Among the reasons that child molesters are able to avoid discipline or future detection are:

- Most victims do not report the crimes, perhaps due to embarrassment or fear and intimidation. Others may not come forward until years later.
- Many school systems and child-service organizations lack policies for dealing with sex abuse allegations or are ill-prepared to investigate such charges. Consequently, the allegations are minimized or covered up.
- Key witnesses or their parents may lose patience and drop the charges. Witnesses may be questioned and asked to testify at three separate kinds of hearings: the local school district's disciplinary action or due process hearings, state action to revoke a teaching certificate, and/or criminal prosecution. Many may not want this kind of exposure.
- Investigations and disciplinary proceedings may continue for a long time, consuming limited resources.
- School officials may be reluctant to take on an employee's attorney and labor union without a strong case. Districts must weigh the costs of litigation, including the potential costs of a subsequent defamation lawsuit filed by a wrongly accused employee.

Case in point

An article published by the *Grand Rapids Press* illustrated a classic case in which a convicted sex offender continued victimizing young children throughout his career, in some instances without detection until it was too late.

On March 18, 1993, substitute teacher James Udell was arrested on five felony counts of second-degree criminal sexual conduct for allegedly touching girls on the groin, buttocks and chest at Twin Lakes Elementary School in Muskegon County, Michigan. According to the *Grand Rapids Press*, these charges were not isolated incidents. A trail of sex abuse allegations had haunted Udell's 30-year teaching career.[1]

In 1962, James Udell was accused of improperly touching girls in his fifth-grade class at a Shawnee Park Elementary School. He admitted touching the girls and was sentenced to two years on probation for taking indecent liberties with a child.

He was fired and a letter about the charges was placed in the district's personnel records. The conviction was not included in his records at the state depart-

ment of education.

In September 1964, Udell found a teaching job at an elementary school in the Reeths-Puffer School District near Muskegon. Three years later, with a very good recommendation from his principal, he was hired to teach at Kentwood School District's Meadowlawn School. At that time, Kentwood officials did not check with the Grand Rapids district for references.

During the 1980-81 school year, complaints arose about Udell improperly touching young girls at the school. After further investigation, the principal set up a five-point plan to dispel parental concern and rumor. Udell was told that he should "not allow children to sit on his lap; not touch children by hugging or caressing; not show partiality towards girls; not be alone with any child and maintain reasonable classroom control."

After years of rumors, Udell asked for a transfer and was moved to Bowen School in 1984. Nine months later, Udell resigned and pleaded guilty to fourth-degree criminal sexual conduct for inappropriately touching a third-grade girl. He was sentenced to probation, community service and a $500 fine. He was also ordered to surrender his teaching certificate, although state officials said that only they received a copy. State education officials also stated that they mailed a notice about the revocation to all districts in May 1986.

Between 1987 and 1990, Udell sold insurance, filing bankruptcy three times during that period. He began substitute teaching in 1990, allegedly using the original copy of his teaching credential to obtain substitute employment status from West Michigan school districts.

In January 1993, Udell was accused of improperly touching a young girl who attended Kentwood Community Church, where he was a Sunday school teacher. There apparently was not enough evidence to file charges in that case. Then, on March 18, 1993, Udell was arrested at Twin Lakes Elementary School. Cases such as Udell's are a school district's worst nightmare.

Costly mistakes

Hiring the wrong individual be destructive to the lives of their victims. It can also be expensive. Schools must consider the legal liability for failing to protect students. For example, in 1981, administrators in Lake Washington School District, Washington, failed to mount a serious investigation of a high school basketball coach who reportedly molested a male student.[2]

The school district dropped the investigation after questioning the coach, who denied abusing the boy. Three years later, a new complaint prompted a thorough investigation which revealed that more than 27 boys had been victimized by the coach during his 18-year career. In 1990, school administrators in Lake Wash-

ington School District agreed to pay $2.2 million in damages to five victims and their families.

Cases such as these are not isolated. In Los Angeles, a school district agreed to pay a $6.5 million settlement in a similar case. School systems across the country have contended with the nightmare of child abuse allegations and with the multi-million-dollar expense of employing the wrong people. Many districts now protect themselves from victims' lawsuits by firing anyone accused of sexual misconduct, which also is unfair and can lead to litigation.

How do school systems and child-service agencies avoid witch hunts and yet protect those entrusted to their care? Finding a proper balance between a reasonable level of investigation and unreasonable intrusiveness is essential.

Developing effective personnel policies

The most important step in formulating strategies to prevent the hiring of unfit employees is to develop written policies that will guide all personnel procedures. This ensures consistency and fairness. Effective policies consider the impact and outcomes of each step of the process and address any concerns before problems develop.

Presented at the end of this chapter are policy statements and screening and selection guidelines to effectively screen prospective employees who work with children. These guidelines were jointly developed by the Missing and Exploited Children Comprehensive Action Program Advisory Panel and the National School Safety Center to assist child-service organizations in hiring the right people. Included are sample forms that support the screening process, including employee affidavits, releases and verifications.

According to the Nonprofit Risk Management Center, written policies and procedures offer step-by-step guidelines to make sure the policies are enforced. They also:

- establish a standard for behavior and a common body of knowledge, increasing the likelihood that everyone will understand their responsibilities and do what they are supposed to do;
- support unpleasant, but necessary requirements;
- help ensure operational consistency; and
- strengthen the employer's defense if a lawsuit occurs.[3]

Communicating the policies demonstrates commitment to the goals. An effective policy might include the following statement, "As an agency serving children and youth, it is the policy of this agency to use reasonable efforts to screen prospective employees and volunteers in order to avoid circumstances where

children or youth would be endangered." Both current and prospective employees are made aware of the organization's goal to weed out anyone who poses a potential risk to children.

Aggressive screening

Effective screening of applicants begins with a well-written job description and an application form that aggressively asks for the information required to appropriately assess the candidate's suitability for employment.

Depending upon the nature of the position and the employee's proximity to children, the use of a separate employee affidavit or disclosure form that asks specific questions regarding the applicant's previous conduct may be appropriate. Personal information that is not relevant should not be sought. Information that is obtained must be kept confidential and shared only with whose who have a legitimate need to know.

Most job applications ask if the candidate has ever been convicted of a felony. In screening those who work closely with children, this may not be enough. For a variety of reasons, child molesters often move on to new jobs and locations without discipline, detection or conviction. This is why it is necessary to ask more searching questions, including whether the applicant has been involved with any behavior that may have affected his/her employment or that is even remotely associated with child molestation or abuse.

An application or affidavit that aggressively pursues this kind of information can serve to deter an unfit individual from applying for the job in the first place. If told in advance of the thoroughness of the selection process, applicants who have something to hide may eliminate themselves from the applicant pool.

In addition, requiring that the applicant affirm the truth of the information supplied on the application/disclosure affidavit can serve as a self-screening measure. As stated on the forms, any falsification, misrepresentation or incompleteness in the disclosure can by itself be grounds for disqualification or termination. If a subsequent investigation to verify information reveals that the applicant provided false information, he or she can automatically be removed without recourse from the applicant pool.

The job description will help determine both the employer's level of risk of negligent hiring and the extensiveness of the background investigation required. The more responsibility for and interaction with children that the position requires, the greater will be the need for more thorough applicant screening procedures. For example, a custodian who works the night shift presents less risk than a teacher/advisor who will accompany children on overnight excursions.

Using multiple screening techniques or resources improves the chances of hir-

ing the right person. The use of several of the following screening methods may expose dishonest people by revealing inconsistent responses:

- personal interviews;
- character references;
- employment references;
- criminal background checks;
- driving license/record checks;
- military background checks;
- verification of education, training, certification and licenses; and
- credit and financial history.

When interviewing the applicant, discuss your purpose in screening out individuals who may pose a potential risk to children. Explain the actions that will be taken to verify the information provided on the application and in the interview. Ask the candidate why he or she left his or her last job. If any information written on the application or discussed in the interview is unclear or seems suspicious, ask for further explanation. Ask the same question in different ways and seek information from multiple sources.

Any information worth asking is worth verifying. Begin the background verification by calling and/or writing to former employers, providing them with a copy of the applicant authorization form. Verify specific dates of employment, position held and the applicant's eligibility for re-employment.

Ask specific questions regarding your concern for hiring appropriate people to serve children. Although obtaining this kind of information in writing has its advantages, the possibility that someone with knowledge about the applicant, who might be willing to speak "off the record," should not be overlooked.

It is also important to be prepared with written policies to address the failure on the part of previous employers to complete the employment verification request and the employer disclosure affidavit.

Certain kinds of information serve as a red flag to signal that an applicant may not be all that he or she appears to be. For example, several sudden and unexplainable moves may indicate that this person has had a history of problems on the job or has been asked to voluntarily leave to avoid termination. Gaps in employment may indicate that other employers have found this person to be unsuitable due to information uncovered in their investigations.

The inability of a previous employer to answer questions directly may signal that something is amiss. An awkward pause may call for additional questioning. If a former employer expresses reservations but is not willing to offer the facts, press the applicant for an explanation.

Universities and colleges will verify a job applicant's degree, credentials or attendance; many will confirm this information over the phone. Driving records (MVRs) can quickly and inexpensively verify legal name and date of birth as well as safety violations, suspensions and revocations. A reckless driving record could indicate other potential job problems. Wages that have been garnished or serious medical risks may pose other concerns. The bottom line is to make a comprehensive "check and balance" review of several resources, while not exclusively relying on any single indicator.

After conducting a preliminary background investigation, lay out all the facts collected to see if they match the information provided by the applicant. If something seems suspicious, continue looking for additional information or ask the applicant for clarification.

Criminal background checks

Most criminal records are public. Anyone can request a file on a person's arrest or conviction by going directly to the courthouse and asking. Unfortunately, the seeker must have specific information, such as venue, the year of the arrest, case number, etc., in order to know where to look. The *history* of an individual's criminal charges and convictions, however, is usually not available to the public through court records.

The courts and the FBI do maintain this information, but it is generally available to law enforcement and then only for criminal justice purposes. Many states maintain a central state repository of criminal history information, but it usually contains state rather than national information. In varying degrees, data from these registries are available to noncriminal justice agencies. In some states, the repository also serves as a processing agency for requests for the release of criminal history information from the FBI.

A check of the National Crime Information Center (NCIC), Triple-I, and state and local criminal registries should be included in a background investigation. Not to be confused with standard checks through the FBI's Identification Division, both NCIC and Triple-I are telecommunications systems maintained by the FBI.

NCIC is a network of federal, state and local police agency files, containing databases on missing persons, wanted persons, stolen vehicles, etc. Triple-I contains all computerized criminal record files on individuals. These files are maintained by approximately 20 participating states. Both NCIC and Triple-I are limited to access of automated files. Many FBI files are maintained manually and not available through either of these systems.

A bill to create a national criminal background check system was passed by

Congress and signed into law by President Clinton in December 1993. The Child Protection Act of 1993 will establish a national database of convicted abusers and allow designated youth organizations to check if a prospective employee or volunteer has a conviction for abuse and certain other crimes. These convictions include murder, assault, kidnapping, domestic violence, sexual assault, prostitution, arson and drug-related felonies.

Creating a spirit of cooperation

Employers are often reluctant to provide information regarding former employees, particularly when there is information that could prevent them being hired. Fear of lawsuits causes some employers to err on the side of silence.

Unfortunately, these practices allow pedophiles and other ill-suited employees to continue to do harm to children without detection. An interesting question is posed: Can former employers be implicated in a lawsuit for not disclosing vital information that could have prevented a child from being victimized?

Some states mandate that the state department of education be notified if a background search produces any conviction information on a teacher applicant or credential candidate. Information sharing and networking of this nature can help to keep child molesters and pedophiles out of classrooms, schools and youth-serving organizations. School systems could arrange informal agreements with other systems and agencies to notify each other regarding convicted child molesters, thus eliminating the need for expensive, exhaustive searches for background information on these individuals.

Obstacles to overcome

Several factors currently impede the use of comprehensive record screening and background checks in schools and youth-service agencies. They are often offered as excuses for not conducting even minimal checks of prospective employees. Among these factors are:

- the cost of investigation;
- the slow response rate and turnaround time of current systems;
- the questionable accuracy of information collected;
- the fear of driving away worthy applicants due to the bureaucratic nature of the process; and
- the fear of creating a new standard of care which may lead to further lawsuits.

These are legitimate concerns. The use of the model policies and guidelines that follow, together with the national database created by the newly passed Child Protection Act of 1993 and an enhanced spirit of cooperation among agen-

cies nationwide, can help to overcome these challenges and assist efforts to protect our nation's children.

Following are model policies and guidelines for use by schools and youth agencies. The language used in these models describes the commitment, goals and implications of conducting comprehensive record screening and background checks to protect children and youth.

School systems and other youth-service providers that are interested in adopting these models should check local and state laws for compliance and reference these laws in the policy statements where indicated.

In addition, specific operating procedures should be implemented regarding who has access to the information, how long the information will be kept and how it will be dispensed. Procedures should also address who will pay the fees associated with a background investigation, and how an applicant will be advised of disqualifying information and provided with an opportunity to review, obtain correction of and respond to the information obtained.

Endnotes

1. Kolker, Ken. "How trail of sex abuse allegations haunted his long teaching career." *Grand Rapids Press*, March 28, 1993.
2. Ervin, Kevin. "Schools learn through lessons on abuse." *The Seattle Times*, September 11, 1992.
3. Tremper, Charles and Gwynne Kostin. *No surprises, controlling risks in volunteer programs*. Nonprofit Risk Management Center, 1993.

POLICY STATEMENT:

Children and youth have been the victims of physical, psychological and/or sexual abuse by professionals or volunteers employed to assist, educate, serve, monitor or care for them. Those who victimize children or youth frequently do so on repeated occasions and seek employment or volunteer for activities that will place them in contact with potential victims. As an agency serving children and youth, it is the policy of this agency to use reasonable efforts to screen employees and volunteers in order to avoid circumstances where children or youth would be endangered.

SCREENING GUIDELINES:

<u>In General</u>:

All prospective employees and volunteers who would have contact with children or youth will be screened to determine from reasonably available background information whether they pose a material risk of harm to such children or youth because of past conduct or other factors that indicate a potential for physical,psychological and/or sexual abuse to children or youth. Applicants, as a requirement for consideration, must cooperate fully with an investigation and provide fingerprints, information or consents as may be necessary to conduct the investigation.

Conduct of Background Search:
Background searches are to be undertaken by individuals designated by the agency's chief administrative officer. Based on preliminary results of the background investigation, persons/volunteers may be offered temporary/probationary status. Before a person is offered employment or allowed to volunteer, the findings from the background search will be reviewed. Fees associated with a background investigation will be paid according to established agency guidelines and procedures unless otherwise stipulated.

If information from a background search is obtained that reflects or may reflect on a person's fitness for service as an employee or volunteer and the person is otherwise qualified for such service, the prospective employee or volunteer will be advised of the information and provided an opportunity to review, obtain correction of and respond to the information obtained. The source of information will not, however, be provided where given to the agency with the understanding that the source would be confidential.
Information obtained by the agency should not be further disclosed beyond the multi-agency team and is for purposes of the agency only. Such information may be disseminated to other authorized youth-serving agencies who are legally entitled to receive such information by the local jurisdiction unless restricted by law.

Minimum Screening Requirements:
Background checks of employees and volunteers shall be made as required by applicable statute or regulation. These statutes and regulations include:

[*Reference applicable statutes or regulations.*]

Background Searches
Background searches may include investigations as may appear appropriate in the circumstances. Examples include:

- Applicant references.
- Federal, state or local law enforcement officials.
- State or local license or certificate registration agencies.
- Health records.
- Newspapers.
- Criminal court records.
- Civil court records.

SELECTION GUIDELINES:

In General:
No background information obtained from employee and volunteer screening is an automatic bar to employment or volunteer work unless otherwise provided by statute or regulation. Instead, information obtained will be considered in view of all relevant circumstances and a determination made whether the employment of or volunteering by the person would be manifestly inconsistent with the safe and efficient operation of the agency recognizing the need to protect children and youth from physical, psychological and/or sexual abuse.

Required Disqualification:
No employee or volunteer will be employed or utilized who is disqualified from so serving by any applicable statute or regulation. These statutes and regulations include:

[*Reference applicable statutes or regulations.*]

Additional Considerations:
A candidate may be disqualified from a position based on background information obtained from employee and volunteer screening although not barred by applicable statute or regulation. Other conduct, matters or things may warrant disqualification in order to reasonably protect children and youth from physical, psychological and/or sexual abuse. Applicant's failure to provide information requested will result in automatic disqualification of the applicant.

Where information is considered relevant to a position, the circumstances of the conduct, matter or thing will be evaluated to determine fitness. The circumstances considered may include, but are not necessarily limited to:

- The time, nature, and number of matters disclosed;
- The facts surrounding each such matter;
- The relationship of the matter to the employment or service to be provided by the applicant;
- The length of time between the matters disclosed and the application;
- The applicant's employment or volunteer history before and after the matter;
- The applicant's efforts and success at rehabilitation as well as the likelihood or unlikelihood that such matter may occur again; and
- The likelihood or unlikelihood that the matter would prevent the applicant from performing the position in an acceptable, appropriate manner consistent with the safety and welfare of children and youth served by the agency.

No Entitlement:
The failure of a background investigation to disclose information justifying disqualification of an applicant does not entitle the applicant to employment. Positions are filled on the basis of all qualifications and relevant employment considerations.

SUBSEQUENT INFORMATION:

Should any information be obtained reflecting on the fitness of an employee or volunteer to serve after selection or commencing service, such information will be considered by the agency. This information will be evaluated in a manner similar to its consideration in the selection process. Where appropriate, the services of the employee or volunteer may be suspended or terminated, or other appropriate action may be taken. Providing false, misleading or incomplete information by an employee or volunteer warrants termination.

EFFECT OF GUIDELINES:

The agency does not assume by these guidelines any obligation or duty to screen applicants or undertake background searches beyond that which would be required by law without these guidelines. No person shall rely on the use of background searches or any particular level of searches by virtue of these guidelines.

[*Insert agency name/logo, address*]

AUTHORIZATION
TO RELEASE INFORMATION

REGARDING:

Applicant's name:_____
Applicant's current address:_____
Applicant's social security number:_____
Agency Contact Person:_____
Authorization expiration date:_____

I, the undersigned, authorize and consent to any person, firm, organization, or corporation provided a copy (including photocopy or facsimile copy) of this **Authorization to Release Information** by the above-stated agency to release and disclose to such agency any and all information or records requested regarding me including, but not necessarily limited to, my employment records, volunteer experience, military records, criminal information records (if any), and background. I have authorized this information to be released, either in writing or via telephone, in connection with my application for employment or to be a volunteer at the agency.

Any person, firm, organization, or corporation providing information or records in accordance with this Authorization is released from any and all claims or liability for compliance. Such information will be held in confidence in accordance with agency guidelines.

This authorization expires on the date stated above.

_____ _____
Signature of Prospective Employee Date

_____ _____
Witness to Signature: Date

[Insert agency name/logo/address]

APPLICANT DISCLOSURE AFFIDAVIT
(Please Read Carefully)

Our agency screens prospective employees and volunteers to evaluate whether an applicant poses a risk of harm to the children and youth it serves. Information obtained is not an automatic bar to employment or volunteer work, but is considered in view of all relevant circumstances. This disclosure is required to be completed by applicants for positions in order to be considered. Any falsification, misrepresentation or incompleteness in this disclosure alone is grounds for disqualification or termination.

APPLICANT:_____
Please print complete name and social security number.

The undersigned applicant affirms that I HAVE NOT at ANY TIME (whether as an adult or juvenile):

Yes	**No**	*(Initial if answer is yes or no and provide brief explanation for a "yes" answer below.)*
____	____	Been convicted of;
____	____	Pleaded guilty to (whether or not resulting in a conviction);
____	____	Pleaded nolo contendere or no contest to;
____	____	Admitted;
____	____	Have had any judgment or order rendered against me (whether by default or otherwise);
____	____	Entered into any settlement of an action or claim of;
____	____	Had any license, certificate or employment suspended, revoked, terminated or adversely affected because of;
____	____	Been diagnosed as having or treated for any mental or emotional condition arising from; or,
____	____	Resigned under threat of termination of employment or volunteer work for;

Any allegation, any conduct, matter or thing (irrespective of the formal name thereof) constituting or involving (whether under criminal or civil law of any jurisdiction):

Yes	No	*(Initial if answer is yes or no and provide brief explanation for a "yes" answer below.)*
____	____	Any felony;
____	____	Rape or other sexual assault;
____	____	Drug/alcohol-related offenses;
____	____	Abuse of a minor or child, whether physical or sexual;
____	____	Incest;
____	____	Kidnapping, false imprisonment or abduction;
____	____	Sexual harassment;
____	____	Sexual exploitation of a minor;
____	____	Sexual conduct with a minor;
____	____	Annoying/molesting a child;
____	____	Lewdness and/or indecent exposure;
____	____	Lewd and lascivious behavior;
____	____	Obscene literature;
____	____	Assault, battery or other offense involving a minor;
____	____	Endangerment of a child;
____	____	Any misdemeanor or other offense classification involving a minor or to which a minor was a witness;
____	____	Unfitness as a parent or custodian;
____	____	Removing children from a state or concealing children in violation of a law or court order;
____	____	Restrictions or limitations on contact or visitation with children or minors;
____	____	Similar or related conduct, matters or things; or
____	____	Been accused of any of the above.

EXCEPT THE FOLLOWING:

(If you answered "yes" to any of the above please explain, if none, write "none".)

Description Dates

_____

_____

_____

The above statements are true and complete to the best of my knowledge.

Date: _____ _____

Applicant's signature

Date: _____ _____

Witness to signature

[Insert agency name/logo/address]

REQUEST FOR INFORMATION

TO:
APPLICANT:

Name _____ Social Security Number _____

Dates of Employment _____ Immediate Supervisor _____

Our agency *[insert name]*, is requesting information regarding the above-mentioned applicant who is seeking a position. This agency serves children and youth and, accordingly, undertakes background investigations to determine whether the individual poses a risk of harm to those who would be served.

We are interested in receiving any information or records that would reflect on the applicant's fitness to work with children and youth. Please complete the attached EMPLOYER DISCLOSURE AFFIDAVIT and return it to our agency at your earliest convenience. Although any information you wish to provide is welcomed, we are especially interested in any conduct, matter or things that involve established or a reasonable basis for suspecting physical, psychological or sexual misconduct with respect to children or youth.

You may receive a separate written or telephone request from our agency for an employment reference regarding the applicant. Please respond to each request independently.

With this request is an authorization executed by the applicant. This releases you from any liability for your reply, either in writing or via telephone.

Thank you for your assistance.

Very truly yours,

_____

Failure by your agency or organization to provide information requested may result in automatic disqualification of the applicant.

[Insert agency name/logo/address]

EMPLOYER DISCLOSURE AFFIDAVIT

(Please Read Carefully)

Our agency screens prospective employees and volunteers to evaluate whether an applicant poses a risk of harm to the children and youth it serves. Information obtained is not an automatic bar to employment or volunteer work, but is considered in view of all relevant circumstances. This disclosure is required to be completed by former employers in order for the applicant to be considered.

APPLICANT:_____

Please print complete name and social security number.

As an agent of the former employer of the undersigned applicant, I affirm to the best of my knowledge that the undersigned applicant HAS NOT at ANY TIME:

Yes	**No**	*(Initial if answer is yes or no and provide information for a "yes" answer below.)*
____	____	Been convicted of;
____	____	Pleaded guilty to (whether or not resulting in a conviction);
____	____	Pleaded nolo contendere or no contest to;
____	____	Admitted;
____	____	Had any judgment or order rendered against him or her (whether by default or otherwise);
____	____	Entered into any settlement of an action or claim of;
____	____	Had any license, certificate or employment suspended, revoked, terminated or adversely affected because of;
____	____	Been diagnosed as having or treated for any mental or emotional condition arising from; or,
____	____	Resigned under threat of termination of employment or volunteer work for;

Any allegation, any conduct, matter or thing (irrespective of the formal name thereof) constituting or involving (whether under criminal or civil law of any jurisdiction):

Yes	**No**	*(Initial if answer is yes or no and provide brief information for a "yes" answer below.)*
____	____	Any felony;
____	____	Rape or other sexual assault;

Yes	No	*(Initial if answer is yes or no and provide information below for a yes answer)*
____	____	Drug/alcohol-related offenses;
____	____	Abuse of a minor or child, whether physical or sexual;
____	____	Incest;
____	____	Kidnapping, false imprisonment or abduction;
____	____	Sexual harassment;
____	____	Sexual exploitation of a minor;
____	____	Sexual conduct with a minor;
____	____	Annoying/molesting a child;
____	____	Lewdness and/or indecent exposure;
____	____	Lewd and lascivious behavior;
____	____	Obscene literature;
____	____	Assault, battery or other offense involving a minor;
____	____	Endangerment of a child;
____	____	Any misdemeanor or other offense classification involving a minor or to which a minor was a witness;
____	____	Unfitness as a parent or custodian;
____	____	Removing children from a state or concealing children in violation of a law or court order;
____	____	Restrictions or limitations on contact or visitation with children or minors;
____	____	Similar or related conduct, matters or things; or
____	____	Been accused of any of the above.

EXCEPT THE FOLLOWING:

(If you answered "yes" to any of the above please provide information below, if none, write "none".)

Description Dates

_____

_____

_____

The above statements are true and complete to the best of my knowledge.

Date:_____ *Signature*

_____

Name_____ Title_____

Company_____ Address:_____

City/State/Zip_____ Phone_____

Chapter 3

The tort of negligent hiring

School employees are in a unique position. They spend many hours each day with our nation's youth, modeling appropriate behavior and showing young people how to live and get along with others in a democratic society.

Parents need to know that they can trust those who work in their children's school. They want the school to do its best to protect children from intruders who do not belong on the campus or dangerous students who need to be controlled. Most of all, parents want assurance that school employees themselves are not preying on children.

No one wants a drive-by shooting or a stabbing harming their child at school, but a predator within the employ of the school district is doubly deadly. It strikes at the very heart of the educational process. Parents distrust the institution of education when a teacher or administrator sexually molests or physically assaults a student. And, when the school is perceived as backing the predator instead of the student, cynicism toward public education results.

Placing the public at risk

Certain individuals should never be hired to work directly with members of the public because they have demonstrated dangerous propensities on former occasions. They may or may not have a criminal record, but any reasonable person would conclude that if such individuals were hired, a real likelihood exists that a third party would get hurt.

This issue impacts all of society, not just public education. Several states recognize a cause of action based on the view that negligence in hiring or retaining an employee may place the public at risk.[1] Under certain circumstances, an employer can be held liable for injury caused by a negligently hired or retained employee.

The doctrine of negligent hiring/retention states that an employer can be liable

if he knew or should have known of an employee's dangerous propensities and this negligence was the proximate cause of the injury. The idea focuses on the duty of an employer to know whether an employee is unfit for a particular job.

All negligence causes of action require proof of four basic elements: the employer had a duty to the person that was injured; the employer either did something or failed to do something and in the process breached a duty to the injured person; the breach of this duty was the proximate cause of the injury; and, the injury itself must be proven. Most of the negligent hiring/retention cases do not focus on causation or injury but on the first two elements of duty and breach.

The tort of negligent hiring/retention begins with the view that the employer has a duty to hire and retain high quality employees so as not to endanger members of the public. The key question here is: With whom will the employee be working? Does an employer have a duty to refrain from hiring an employee who has been convicted and served time for rape if that person is to load rocks in a quarry? Probably not. The job itself anticipates little contact with the public. What if the employee will be selling the rocks to customers in a store? The nature of this job is very different from the former one. Depending upon the work environment, one could argue whether this would or would not put the public at risk. On the other hand, would an employer want to hire this person to make home deliveries of rocks, especially if most of the deliveries were made during the day? To do this would clearly endanger the public and, according to the tort of negligent hiring/retention, refraining from hiring the employee for that job is a duty an employer owes his customers.

Conducting reasonable investigations

If an employer has a duty to hire and retain employees so as not to endanger the public, what constitutes a breach of that duty? The breach is usually stated as the failure to fully and adequately investigate the employee's background. Once again, it is important to ask: With whom will the employee be working? With adults or children? Will contact be during the day or night? What type of contact with the public is anticipated and required as part of the job description? It is important to answer these questions, since a full and adequate investigation will vary, depending upon the nature of the job. The court will ask if the company's investigation was reasonable under the circumstances.

What would constitute a full and adequate investigation of someone who is going to load and drive rocks from the quarry? Most employers would consider a driving record and prior work history. Some people believe that a criminal record check should be required even for this job. If an employer conducted a background investigation, there could be no negligence, unless he ignored rel-

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evant findings and hired the person anyway. If an employer did not investigate, that would constitute negligence as a matter of law. Courts have rejected this per se rule for various reasons, but the main one is the question of need for a blanket policy. Think again about the rock quarry job. What is gained by requiring a criminal background check on someone who is going to be loading and transporting rocks?

There are two situations in which courts frequently hold that an employer's failure to check a prospective employee's criminal history was not reasonable. The first is where an employer hires or retains a person for a job that requires frequent contact with members of the public. The second is where an employer hires or retains someone for a job involving close contact with particular persons as a result of a special relationship between such persons and the employer.

The first situation is easy to understand. Driving a truck full of rocks probably does not require frequent contact with members of the public, but working in a store where the rocks are sold does. Thus, a reasonable investigation would differ for each of those jobs. The second situation is illustrated by one case where an employee initially hired for outside maintenance of a townhouse was transferred to perform inside work, giving him access to passkeys.[2] His initial duties included only incidental contact with tenants. His transfer to a job with inside access required a different type of investigation.

A special relationship exists between an owner and tenants. It is unreasonable to allow access to the passkeys to just anyone, in this case, someone whose criminal record had not been checked. Thus, an employer should focus on the duties of a particular job and ask what a full and adequate investigation would be for the employee who takes that job. A person who was hired previously for one job may need to be investigated more fully for a different job.

It cannot be emphasized too much that the purpose for which the employee is hired is very important. In *Connes v. Molalla Transport System, Inc.*,[3] a hotel clerk who was assaulted by a truck driver brought action against the truck driver's employer. The court held that the employer was not negligent because it had no legal duty to investigate the non-vehicular criminal record of its driver prior to hiring. The company was hiring someone to drive a truck. What was a reasonable investigation for this job? The company's hiring procedure required a personal interview, an extensive job application form, a current driver's license and a medical examination. The company also contacted prior employers and investigated the applicant's driving record within the state. If the employer had not taken these steps and the employee had run over a pedestrian, the plaintiff could argue that the employer had been negligent. But is it reasonable to assume that a full and adequate investigation of a truck driver should include a check of the

employee's criminal history? The answer in this situation was "No."

Relationship of trust

Negligent hiring and retention is a real concern for businesses that provide services to youth. Teachers and youth-serving professionals generally have jobs that require frequent contact with the public, namely, children. These professionals are also in a special relationship of trust and authority.

Although courts are hesitant to require criminal background checks for all employees, this practice in youth-serving fields provides a safety net for employers. There may be jobs with youth-serving agencies that do not require frequent contact or a special relationship with the public, but a wise policy would be to conduct criminal background checks of all employees. These background checks would go far in meeting the requirement of a reasonable investigation.

Each position must be evaluated separately and assessed based on the public interaction required for each *particular* job. This evaluation can be done based on the employer's job description. There are also situations in which negligence in hiring someone will be based on violations of the requirements for the job enumerated in state law.

For example, in *Brantly v. Dade County School Board*,[3] the court held that maximum regard for safety and adequate protection of the health of its students imposed a duty on the school board to properly hire, train and retain school bus drivers. Evidence of prior notice of a driver's past derelictions of duty alleged sufficient facts to claim negligence under state law.

In this case, the school knew that the bus driver allowed the students on the bus to be rowdy. They were regularly out of control, and the bus driver did nothing to restrain them. One student stuck his hand out the window of the bus and struck the plaintiff. The same thing had happened down the road, not too many minutes earlier, without any response from the bus driver. Although the school district might not be liable for negligent hiring or training, it had retained someone who was not qualified for that particular job.

Along with consideration of a particular job and the qualifications needed to do that job, a potential employee can be deemed unfit because of a *particular* quality or history. The courts refer to a disqualifier as a "propensity" or "proclivity." In other words, an applicant may be able to do the job, but a reasonable person would know after looking at his or her qualifications, previous acts and work history that the applicant would create a danger of harm to third parties if hired. The applicant might have a criminal record relevant to the particular job or simply be lacking in a skill necessary to do the job.

In *Fallon v. Indian Trail School*,[4] a former student brought action against a

school district to recover for spinal injuries suffered as a result of a trampoline accident. The student argued that the school district negligently hired the teachers who conducted the physical education program during which the injury occurred. The court held that the student had not pointed to any particular qualities or lack of skills which would make the teachers unfit for their job.

Employers should take a detailed look at the job and the qualifications of the applicant. Employers must also be careful not to go too far in rejecting an applicant for a job for which they are fit simply because they may be unfit for a different job. In *Butler v. Hurlbut*,[6] the court referred to the employer's "Hobson's choice" — an apparently free choice that offers no real alternative. A policy of not hiring anyone with a criminal record may be in violation of statutory enactments such as Title VII of the Civil Rights Act or similar state statutes. An employer, however, may be liable for negligently hiring a person without investigating their criminal record and rejecting such application if it reveals an applicant's dangerous proclivities. In *Butler*, the court concluded that it would decide these kinds of lawsuits on a case-by-case basis.

That is a wise course for employers, too. If the policy is not to conduct a criminal background check on each employee, then the employer should at least analyze the nature of the particular job based on the frequency of contact with the public and/or the special relationship between the employer and the public. A greater degree of public contact and the existence of a special relationship increases the likelihood that the court will find the employer negligent in the absence of a criminal background check.

There are occasions in which no amount of checking on a person's background will reveal any disqualifying propensities. The case of *Medlin v. Bass*[7] is a perfect illustration of an employer's worst nightmare. A student who was allegedly sexually assaulted by the school principal sued the school district for negligently hiring the principal. Although the suit was dismissed because there was not enough available evidence in the principal's background for the district to predict the alleged act, the facts demonstrate why it can be difficult to screen out those with dangerous propensities.

The principal had worked in another school district within North Carolina. Years before the alleged incident, a student accused Bass of sexually assaulting him. During an interview with his superintendent, Bass neither confirmed or denied it. Instead, he resigned for "health reasons," and school personnel never investigated the incident further.

Bass then moved and got a new job in a new school district. He had no criminal record, and references from the old district — personal friends of Bass — gave him glowing marks. The previous superintendent, even when asked, said

nothing about the prior alleged assault. There was nothing to cause the new district to think that Bass was a pedophile. All of the previous records had been checked, but the cover-up policy led to an additional tragedy. The school district was not liable, but a great wrong had been done.

Sovereign immunity

The tort of negligent hiring/retention conflicts with the sovereign immunity that many states provide government employees. Founded on the ancient principle that "the King can do no wrong," the doctrine of sovereign immunity prohibits holding the government liable for the torts committed by its officers or agents unless such immunity is expressly waived. States are divided on the nature and extent of sovereign immunity. They vary as to whether or not the acts of hiring, retaining and supervising a school employee or other youth-serving professionals are waived. In some jurisdictions, it is virtually impossible to win a negligence suit against a school district.

States such as Florida provide sovereign immunity but waive it, recognizing that school boards have a common law duty to protect others from the results of negligent hiring, supervision or retention.[8] While New Mexico recognizes the tort of negligent hiring, immunity is granted to school boards pursuant to the state's Tort Claims Act.[9]

Schools and youth-serving agencies have a moral obligation if not a legal duty to hire those individuals who will not endanger the ones they have been commissioned to serve. Nothing compares with the betrayal of trust that occurs when a school employee harms a child placed in the school's care. When schools take the requisite steps to hire, train, supervise and retain only those who are fit to do the job, one of the most important steps toward creating a safe school environment has been taken.

Endnotes

1. Those states recognizing the tort of negligent hiring include: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, and Washington.
2. Williams v. Feather Sound, Inc., 386 So.2d 1238, 1240 (Fla.App.1980).
3. 831 P.2d 1316 (Colo. 1992).
4. 493 So.2d 471 (Fla. Dist. Ct. App. 1986).
5. 148 Ill.App.3d 931, 500 N.E.2d 101 (1986).
6. 826 S.W.2d 90 (Mo. Ct. App. 1992).
7. 327 N.C. 587, 398 S.E.2d 460 (1990).
8. School Bd. of Orange County v. Coffey, 524 So.2d 1052 (Fla. Dist. Ct. App. 1988).
9. Rubio v. Carlsbad Municipal Sch. Dist., 106 N.M. 446, 744 P.2d 919 (N.M. Ct. App. 1987).

Chapter 4

Record screening: good and bad news

"I don't know why all employers don't do it," an observer was heard to utter, noting the recent trend of some child-care providers to closely screen prospective employees to minimize the exposure of children to molesters. The statement represents the sentiments of many observers on the issue of background checks.

As private and public voices continue to turn up the volume in policy debates on record screening, it may be helpful to discuss the issue purely in terms of law to shed additional light on possible reasons for official reluctance to embrace blanket screening laws. A short list of concerns exists that justifies the deliberate, and sometimes reluctant, approach lawmakers bring to the issue. The most formidable objections arise out of constitutional concerns of due process, privacy and equal protection. This chapter will focus on due process.

Due process represents a two-edged sword for lawmakers. Both employees and children may invoke its protections, and laws must somehow navigate a course between the two potential challenges. In most instances, its protections are triggered only when government acts. Ironically, with regard to record screening and the knowledge it provides an employer, inaction will also sometimes produce a violation. Due process will ordinarily not reach private action, but broad screening laws may extend the reach of the right.

The concept of due process is more well-known as a restraint rather than as an incentive to government action, in effect, preventing the passage of laws that affect the life, liberty and property of citizens. Typically, the Due Process Clause of the U.S. Constitution does not impose an affirmative duty upon government to protect its citizens. Rather, it serves as a limitation on the state's power to act.[1]

In this view, the government creates a violation only when it acts. This raises particular problems for officials who wish to avoid constitutional issues and the liability that often follows them. Policymakers must be concerned with the question of whether or not to implement a screening law of some type and must con-

sider how a particular policy will impact individuals' constitutional rights.

When a law is passed, this action may trigger due process concerns in at least two ways. First, an applicant who is screened may challenge unfair treatment. For example, an applicant who is refused a job or an employee who is fired after a background check may rely on procedural due process grounds. That is precisely what occurred in the recent case of *Ellen Seabury Henry v. J. Troy Earhart.*[2] The case presented a challenge to a Rhode Island law requiring criminal record checks for all present and future employees of private nursery schools and other preschool programs.[3]

In *Henry*, the plaintiffs argued that they would not be given a fair chance to rebut the presumption of guilt created by the findings of the background check. The Supreme Court of Rhode Island rejected the attack, noting that the state law complied with the due process requirements: Persons accused of having criminal records that would disqualify them would be given the right to request a hearing to rebut the assumption that they were unfit to serve children. Fair hearing procedures that include notice and an opportunity to be heard prior to the dismissal order are essential due process components of a valid screening law.

Second, due process may provide a child with an action against the child-care provider when screening does not occur as required by law or for improper action/inaction after a background is conducted. This attack is on substantive rather than procedural grounds. The victim charges deprivation of life, liberty or property as a result of molestation. This side of the due process equation is the most controversial and often difficult to reconcile, partly because governments have immunity from suit for their actions in many instances and partly because some acts of molestation occur in nongovernmental facilities.

Assume a screening law is passed that provides for a hearing. Is the government guaranteeing safety? Does the law create a duty in such a way that an injured party could use the law as the basis for a liability suit?

In *DeShaney v. Winnebago County Department of Social Services,*[4] the Supreme Court declined to impose a constitutional duty upon a state to protect the life, liberty or property of a citizen from deprivations by private actors, absent the existence of a special relationship.

The dispute in *DeShaney* arose out of the state's repeated acknowledgment of reports of abuse of a minor by his father. Despite these reports, the proper agency did nothing until the father's beating resulted in the child's permanent brain damage. The child and his mother filed a §1983 action against state officials claiming that they violated due process by failing to protect the child against a risk about which they knew or should have known. (42 U.S.C. §1983 creates a private right of action for citizens whose civil rights are violated "under color of

law." To state a cause of action under §1983 for violation of the due process clause, a person "must show that they have asserted a recognized 'liberty or property' interest within the purview of the Fourteenth Amendment, and that they were intentionally or recklessly deprived of that interest, even temporarily, under color of state law.")

The Supreme Court ruled against the child's claim, noting that a state's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause. In certain limited circumstances, however, the government creates a special relationship by imposing a restraint on an individual's freedom to act on his or her own behalf, through incarceration, institutionalization, or other similar restraint of personal liberty, which is the 'deprivation of liberty' triggering the protections of the Due Process Clause.[5] In the instance of child molestation, the Due Process Clause would not be violated unless the harmful conduct occurred while the child was in the "custody" of the government.

"Custody" has an ominous ring in the ears of policymakers because special circumstances do exist in many child-care settings. The *DeShaney* rule still leaves open the possibility that screening laws might create the special relationship needed to trigger due process safeguards for children in public schools and agencies. When states — through compulsory education laws —require children to attend schools, a custodial relationship may be created that obligates the state to ensure the children's safety. The law rejects this argument for now.

In *D.R. v. Middle Bucks Vocational Technical School*,[6] two female students sued to recover for injuries received after repeated sexual molestation by other students in a graphic arts classroom on campus. The court in *Middle Bucks* held that the compulsory education laws were not enough like incarceration or involuntary commitment to trigger due process safeguards by imposing on school officials an affirmative duty to keep kids safe.

Middle Bucks only says that custody is not created by requiring children to attend school programs. But when other factors combine with the law placing a child under the control of a public or private entity, due process may be violated when molestation occurs.

For public schools and agencies, screening laws are — for due process purposes — both good news and bad news. Complying with the law produces reliable information that may require officials to take action to avoid consequences that are reasonably foreseeable. A federal case decided in March 1994 involved the sexual assault of a student by a teacher in a public school. The case, *Doe v. Taylor Independent School District*,[7] resulted in the court finding that a substantive due process right to bodily integrity was violated, when, among other things, school officials' persistent failure to take disciplinary action against a teacher

created the inference that the district had ratified the conduct, thereby establishing a custom within the meaning of §1983.

In *Doe*, a high school female filed a §1983 liability action for violation of her constitutional rights when she was repeatedly sexually assaulted by a teacher who was widely known to have sexually harassed students during his six-year employment. The court ruled that school officials may be held liable for supervisory failures that result in the molestation of a schoolgirl if those failures manifest a deliberate indifference to the constitutional rights of that child.

The court ruled that sovereign immunity did not apply because the exception to governmental liability for actions arising out of the negligence of state employees was never intended to relieve state officials from any duty to safeguard the public from employees whom they know to be dangerous.

The subject of record screening is thus compatible with pre-existing notions of due process and helps to predict how such laws may be treated by the courts. These laws should be viewed favorably, if only for their potential to ensure the safety of children.

Screening laws represent the first step in producing information that equips child-care professionals to act. In the case of public agencies, the duty to act creates sobering responsibilities that even sovereign immunity may not insulate from liability. Moreover, the trend toward finding public agencies liable may result in a natural expansion of the law to private agencies. This may occur by expanding the notion of custody beyond incarceration and mental placements to include state-approved child-care facilities.

It is hard to imagine a future information highway without signs marking the way to safe classrooms and child-care facilities. The decisions we make are only as good as the information we have.

Endnotes

1. For a specific discussion of this point, *see* DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195 (1989); Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459, 465 (3d Cir. 1990); D.R. v. Middle Bucks Vocational Technical School, 972 F.2d 1364 (3d cir. 1991).
2. 553 A.2d 124 (Rhode Island 1989).
3. *See* Rhode Island law Chapter 16-48.
4. 489 U.S. 189 (1989).
5. *See* Estelle v. Gamble, 429 U.S. 97 (1976); Youngberg v. Romeo, 457 U.S. 307 (1982); D.R. v. Middle Bucks Vocation Technical School, 972 F.2d 1364 (3d Cir. 1991).
6. 972 F.2d 1364 (3d cir. 1991).
7. 1994 U.S. App. LEXIS 3846 (5th Cir. Decided March 3, 1994). *See also* Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).

Chapter 5

Sex offender registration

In recent years, state legislatures across the country have examined their sexual assault laws to find ways to increase community protection. Many have attempted to strengthen existing laws by requiring released sex offenders to register with law enforcement or state agencies. Currently, 24 states have such a requirement, and legislation passed by Congress in December 1993 will establish a national index of registered sex offenders.

Do registration laws actually increase community protection? This chapter describes the policy debates and outlines the history surrounding registration laws, summarizes key elements of state laws, and reviews efforts to evaluate registration laws.[1]

Policy intent and debates

A sex offender registration law requires that offenders supply their address to state or local law enforcement. Typically the offender must register following release from confinement and/or during community supervision. Laws in most states apply to *convicted* sex offenders; some states' laws also apply to individuals found by a judge to have *committed* a sex offense (for instance, under a finding of not guilty by reason of insanity). Minnesota extends the requirement to individuals *charged* with a sex offense, whether or not convicted.

Information maintained on the registry varies by states, but at a minimum includes the offender's name, address, and a law enforcement identification number. Some states collect very detailed information, which may include blood samples, employment information, residence history, and vehicle registration numbers. In all cases, the offender is responsible for supplying accurate information, and is penalized for noncompliance.

Once created, the registry becomes a tool that law enforcement uses to solve crimes or, ideally, to prevent them. If a sex offense is committed and no suspect

is located, the registry can be used to identify potential suspects who live in the area, or who have a pattern of similar crimes. States vary in their decisions on which offenders to include in the registry: some register child molesters (Maine, Arkansas and Illinois); some register the most serious categories of offenders (Kansas, Florida and Illinois) or repeat offenders (Ohio, Kansas, Florida and Arkansas); and some register all sex offenders, regardless of the seriousness of the crime or the age of the victim. California and Montana register arsonists in addition to sex offenders; California also registers narcotics offenders. In addition to its 1993 sex offenders registration law, Florida has maintained a registry of all felony offenders since 1957.

Registration laws also create legal grounds to hold sex offenders who do not comply with registration and are later found in suspicious circumstances. For example, if a convicted sex offender is observed loitering around a playground, and when stopped by the police is found not to have registered, the offender can be charged and prosecuted for failure to register. Law enforcement representatives often argue that registration laws thus prevent crimes because the police can intervene before a potential victim is harmed. Thus, some states will pass a registration law without expecting a high rate of voluntary compliance, but still anticipating a law enforcement benefit.

Another intended effect of registration is psychological. Once registered, offenders know they are being monitored. Many lawmakers argue that such knowledge will discourage sex offenders from re-offending. Also, some lawmakers believe that the registration requirement will deter potential first-time sex offenders.

In most states, access to registries is restricted to law enforcement, but in some states citizens can obtain a list of offenders registered in their community. These states justify citizen access to the registry as a means of citizen self-protection, particularly for parents to protect their children.

Supporters of sex offender registration argue that it contributes to public safety by: creating a registry to assist law enforcement in investigation; establishing legal grounds to hold known offenders found in suspicious circumstances; deterring sex offenders from committing new offenses, and in some cases; offering citizens information so they can protect themselves.

The typical legislative goals are summarized well in a bill introduced in the 1993 Alaska Legislature:

The legislature finds that: (1) sex offenders pose a high risk of re-offending after release from custody, (2) protecting the public from sex offenders is a primary governmental interest, (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public

safety, and (4) release of information about sex offenders to public agencies and the general public will assist in protecting the public safety.[2]

Several arguments against sex offender registration often surface during legislative deliberations. These arguments can be summarized as follows:

Civil Liberties:
Registration programs are inconsistent with the goals of a society committed to protecting individuals liberties. Registration is a step toward a "Big Brother" society, or a violation of the rights of offenders. Released sex offenders have paid their debt to society and must not be subjected to further punishment.

Offender Motivation:
By forcing sex offenders to register, society sends a message to these individuals that they are not to be trusted, that they are bad and dangerous people. Such a message can work against efforts to rehabilitate offenders, and inadvertently encourage anti-social behaviors. The offender can use the law to rationalize further crimes: "If society things I'm a permanent threat, I guess I am and there's nothing I can do to stop myself."

Registration laws encourage sex offenders to evade the attention of law enforcement. Some sex offenders, choosing not to comply with the law, will conceal their whereabouts, making investigations of sexual assaults more difficult.

Public Safety:
Registration creates a false sense of security. Citizens may rely too heavily on the registry, not realizing that the majority of sex offenders never appear on registration lists. The reasons are many: only a small proportion of sex crimes are reported, and an even smaller number result in convictions; many offenders plea-bargain down to nonsexual offenses; sex offender registration laws can apply to limited categories of offenders; and many offenders were convicted prior to passage of the law. In addition, not all offenders register. For all these reasons, only a small percentage of sex offenders actually appear on any list. Thus, for a citizen to limit contact with registered sex offenders may slightly reduce the risk of a sex offense, but it does not guarantee safety.

Registration of sex offenders implies that these offenders are the most dangerous, whereas other types of offenders present similar or greater risks. How helpful is it for someone to know that a convicted sex offender lives next door, as compared to knowing that a neighbor is a convicted murder, drug dealer, or armed robber?

Registration will encourage citizen vigilantism. For states where the registration list is public information, citizens may threaten and take action against offenders. The harassment may also be extended to family members of offenders.[3]

Victim Consequences:
If made public, a list of registered sex offenders will disclose the identity of some incest victims. In cases of intra-familial sex offenses, a list of offenders identifies some victims by family, if not by name. Such a violation of privacy may compound the victim's trauma.

Efficiency:
Rather than expend public funds on registration, the state should direct its resources toward other criminal justice activities. A list of all convicted sex offenders, including names, addresses and other information, is expensive to create and maintain. Funds could be better spent on such areas as treatment of incarcerated sex offenders or intensive supervision of a small group of the most serious sex offenders.

Sex offender registration laws have been subject to legal challenges in at least four states. In Arizona, Illinois, and Washington, the courts have found that registration is *not* a form of punishment and therefore not subject to the Eighth Amendment prohibition against cruel and unusual punishment. In California, where registration *has* been examined as a form of punishment, the courts have found it *not* to be cruel and unusual. Challenges on the basis of due process and equal protection have also failed. Registration has not been found to unreasonably infringe on the offender's rights to travel or privacy.[4]

Background of registration laws

There are two distinct periods in the passage of sex offender registration laws: an early period from 1944-67, and a current trend beginning in 1985. The majority of laws were enacted during the second period.

California has the nation's oldest sex offender registration law, enacted in 1944. Arizona passed its first sex offender registration law in 1951, though this law has been repealed and replaced by a 1985 statute. The next four oldest laws were enacted in the decade of 1957-67, in Florida, Nevada, Ohio and Alabama. (Florida's 1957 law required registration of all felony offenders; in 1993 the state enacted a new statute specifically for sex offender registration.) A hiatus of 18 years appears to have followed; none of the current laws were passed in the period between 1968 and 1984. Of the 24 states with current sex offender registration laws,[5] all but five were enacted after 1984. The trend appears to be growing.

Since 1990, 13 of the 24 laws have been enacted, and a total of nine have been amended.

Sex offender registration laws are frequently passed following a particularly brutal sex offense. Examples in four states follow.

Maine: The town of Gorham, Maine, enjoys one of the lowest per capita crime rates in Cumberland County, even though it lies within the largest metropolitan area of the state. But between 1989 and 1992, in this small town of 12,000 citizens, there were six incidents of sexual assaults on children by previously-convicted sex offenders. In a letter addressed to the Maine House of Representatives in March 1992, Gorham Chief of Police Edward J. Tolan wrote, "While the state of Maine does an excellent job in identifying persons convicted of Operating Under the Influence of Intoxicating Liquor, we have no law in place to track convicted sexual offenders."[6] The Maine legislature passed a sex offender registration law in April 1992.

Montana: In 1988, a sex offender was released from a Montana state prison where he served approximately three and one-half years of a five-year sentence for molesting a 13-year-old boy in the town of Libby. During his incarceration, the offender reported fantasies of raping a small, blond-haired boy when released, saying he wanted to "get even with the town of Libby."[7] Less than 10 weeks after his release, the offender left the dead body of an eight-year-old blond boy, sexually molested, beaten, and choked in the underbrush near the Libby cemetery.[8] Spurred by the brutal murder, the Montana legislature passed a sex offender registration law in 1989.

New Hampshire: In 1991, a 75-year-old New Hampshire widow was raped twice and bound up naked with a telephone cord by a convicted sex offender. Upset that her perpetrator's crime was plea-bargained to a reduced charge, the woman publicized her story, appearing on a national broadcast television talk show. Her efforts raised concern and caused her state's governor to appoint an ad-hoc committee to address the issue of sexual assault.[9] In 1993, acting on the committee's recommendations, New Hampshire adopted legislation requiring a sex offender registry.

Washington: In June 1989, a seven-year-old Tacoma boy was brutally assaulted, stabbed, and had his penis severed by a man with a long record of violent assaults on children. In the previous year, a woman was brutally raped and murdered in downtown Seattle by a twice-convicted sex offender on work release from prison. Both incidents sparked widespread outrage that the criminal justice and mental health systems did not adequately protect citizens from sex offenders.[10] The governor responded by appointing a Task Force on Community Protection that recommended a comprehensive law passed by the legislature in 1990.

The law had many new provisions, one of which was sex offender registration.

Overview of registration laws

The 24 current sex offender registration statutes conform in many respects. This section describes typical features: administration, type of information collected, timing, procedures for updating registration, and penalties for noncompliance.

Maintenance of a sex offender registry is generally overseen by a state agency such as the state police or department of corrections, institutions, or probation and parole. The state attorney general often has a central role as well. Local law enforcement is generally responsible for collecting information and forwarding it to the administering state agency. Exceptions are Ohio, where all information is maintained at the local level, and Utah and Oregon, where the state is responsible for both collecting the information and maintaining the central registry.

Generally, a state obtains an offender's name, address, fingerprints, photo, date of birth, identification numbers, and criminal history at the time of registration. In some states, fingerprints and photographs are already on file with the administering department, so other information is simply updated. Other information frequently collected includes place of employment and vehicle registration. Oklahoma, because its Department of Corrections is authorized to collect any information necessary to track an offender after release, collects employment history, residence history, and intended length of stay in current residence. Several states collect DNA information: Arizona, California, Hawaii, Illinois, Louisiana, Missouri, South Dakota, and Wisconsin.

Offenders in different states have varying time frames for registration, ranging from "immediately" to 30 days. In some states, offenders are automatically registered while still in prison; other states impose the registration requirement upon release to community supervision. In Oregon, offenders are automatically registered while in custody; but once released, they have up to a year to renew their registration with the state police. Oregon and New Hampshire require offenders to re-register annually. Ten states grant offenders 30 days or longer; the remaining states allow 15 days or less.

The *duration* of the registration requirement varies from five years to life, and is typically 10 years or longer. Oklahoma allows an exceptional two-year requirement for offenders who complete a state-approved sex offender treatment program (otherwise, the duration is 10 years). Nine states require lifetime registration for some or all offenders, while 15 states require offenders to register for 10 to 20 years. Four states vary the length of the registration requirement according to the seriousness of the offense. In Texas, the requirement ends with completion of parole. In Utah, the requirement extends five years after parole or discharge.

Addresses must be updated in order for the registry to maintain its usefulness to law enforcement and the public. Most states rely upon offenders to notify authorities of new addresses; the offender typically has 10 days to give change-of-address notification. Oregon and New Hampshire require offenders to re-register annually, whether or not they have changed addresses. Both states enforce the annual re-registration requirement passively.

Penalties for sex offenders failing to register range from misdemeanors to lesser felonies. For offenders released under community supervision, noncompliance is frequently punished by revocation of parole or probation. Utah imposes a mandatory confinement of 90 days and one-year probation for noncompliance. Other states impose confinement of one to five years, or a fine of up to $1,000. California, Texas, and Ohio increase the severity of the penalty for repeat failures to register. In California, a third noncompliance is a felony. Minnesota punishes noncompliance by requiring the offender to register an additional five years.

Most states make lists of registered offenders available only to state and local law enforcement, investigating agencies, and other specified agencies or school districts. In Washington State, law enforcement is given authority to release "relevant and necessary information" about sex offenders, and some counties make their list of registered sex offenders available to the public. Some newspapers print the names of offenders registered in their counties.

In Ohio, the information is public, but kept at the local level; there is no statewide central registry. Oregon allows release of limited information to victims; in such cases, victims receive information only about *their* assailant. In Montana, the law does not specifically prohibit the release of information, but the public has not yet requested access to the registry.

Concurrent with registration laws, states have passed other measures designed to protect communities against convicted offenders. These include notification programs and criminal history background checks. Notification programs can be directed at three different audiences: law enforcement; victims and witnesses connected to specific offenders; and citizens in a particular neighborhood or community. Some states allow victims and witnesses to enroll in a program which lets them know where the offender is located during confinement, and where and when the release occurs. Other states require the departments of prisons or parole to inform local law enforcement when an offender believed to be dangerous is released from prison and intends to reside in a specific community.

In Washington, notification programs are expanded beyond these groups. Washington's law, known as "community notification," authorizes law enforcement to release "relevant" information about convicted sex offenders to the pub-

lic.[11] The notification activities have included front-page news articles, flyers and posters, and canvassing of neighborhoods.[12]

In many states, criminal history background checks are required when individuals apply for jobs or volunteer positions that involve interaction with children. In California and Washington, these background checks are linked to sex offender registries. Other states do not have this capacity, either because the systems are administered independently, or because state confidentiality laws prohibit dissemination of registration information.

Most states with registration laws do not require juvenile offenders to register (except when convicted under adult statutes). States that routinely seal or destroy juvenile records are generally unable to impose a registration requirement upon juveniles because of confidentiality laws. In Ohio, for example, registration of juveniles is not considered viable for this reason. Even the fingerprinting of a juvenile is prohibited unless a judge authorizes it. Thus, the administrative complexities of collecting identification information are considered prohibitive. Similarly, a 1989 Montana law requiring juvenile registration has not been enforced, because juvenile records are confidential in Montana.

Seven states have imposed a registration requirement on juvenile sex offenders: California, Colorado, Idaho, Illinois, Rhode Island, Texas, Washington, and Wisconsin. Washington registers juveniles and keeps records indefinitely, requiring both adult and juvenile Class A felony sex offenders to register for life, Class B sex felons for 15 years following release, and Class C sex felons for 10 years. California and Rhode Island destroy juvenile registration records when the offender reaches age 25; Texas, where registration requirements only extends through the duration of parole in any case, destroys juvenile records at age 21. Of the remaining states that register juvenile sex offenders, none has a lifetime registration requirement.

The initial cost of implementing a new registration law varies, depending on the need for investment in new equipment. In Oklahoma and Oregon, existing electronic systems were easily adapted to accommodate registration information, with nominal added costs. Other states created entirely new information systems. In Washington, where a new system was created in 1990, the state initially paid $39,000 for special equipment. California has been updating its registration technology in recent years, with investments in computers and other equipment.

Annual costs may include data collection and entry, administration of the central registry, administration of registration forms, program evaluation, compliance monitoring, and enforcement. Maintenance of a central registry generally requires a small staff (approximately two full-time employees in Washington, five or six in California, three in Illinois). Most states provide funds for mainte-

nance and administration of a central registry, but enforcement and local administrative costs are generally borne by local governments. Washington allocates nearly $100,000 annually to reimburse local sheriff's departments for administrative costs.

Active enforcement of registration laws is costly, requiring law enforcement to contact registered offenders periodically, either by mail or in person. In many states the level of enforcement varies by local jurisdiction, depending on the availability of funds for active enforcement. Most states enforce their registration laws passively, waiting for noncompliant offenders to come to the attention of law enforcement through suspicious behavior or new offenses; such states have no way of knowing how many sex offenders fail to register.

Evaluating registration laws

To date, evaluations of registration laws have been limited. Except for a few states (California, Florida, Nevada and Ohio), most of the laws were enacted recently and have not been evaluated. Only California and Washington have produced written evaluations. A 1988 study by the California Department of Justice found that adult sex offenders released from prison in 1973 and 1981 had compliance rates of 54 and 72 percent, respectively.[13] As of October 1, 1993, the compliance rate for adult sex offenders in Washington was 79.6 percent.[14] Thus, in both California and Washington, approximately three out of four sex offenders required to register actually did so. This compliance rate is much higher than predicted by critics of registration laws.

Significantly, high rates of voluntary compliance are not essential for a registration law to have law enforcement benefits. If a complete list of released sex offenders who *should* have registered is routinely produced by the state prison system, then law enforcement can choose whether to actively pursue those not in compliance, or to enforce passively, reserving noncompliance charges for offenders whose behavior draws the attention of law enforcement. In several Washington counties, local authorities conduct thorough background checks on all released offenders and use the information — regardless of compliance — as an investigative tool.

In addition to measuring compliance, California's 1988 study looked at the *recidivism rates* of released sex offenders and has examined the extent to which registration actually assists in the investigation of sex crimes. A 15-year follow-up study was conducted of sex offenders first arrested in 1973. Nearly half (49 percent) of this group were re-arrested for some type of offense between 1973 and 1988, and 20 percent were re-arrested for a sex offense. Those whose first conviction was rape (by force or threat) had the highest recidivism rate — 64

percent for any offense and 25 percent for a sex offense.

Based on the responses of 420 criminal justice agencies, the California study found that a large proportion of criminal justice investigators believed the registration system was effective in locating released or paroled sex offenders and apprehending suspected sex offenders. For this reason, the vast majority of those surveyed believed the registration requirement should be continued. Approximately one-half of the respondents believed that registration deterred offenders from committing new sex crimes.

Endnotes

1. This chapter was written by Roxanne Lieb, Barbara E.M. Felver and Carole Poole for the Washington State Institute for Public Policy, The Evergreen State College, Olympia, Washington. Information was collected March 3 - April 14, 1992, and September 29 - October 25, 1993 from states known to have sex offender registries. Informants were administrators, legislative research staff, legal counsel, or law enforcement officials as appropriate. Anywhere from one to three informants were contacted in each state. This report also uses information provided by the National Center for Missing & Exploited Children in Arlington, VA, and the National Center for Prosecution of Child Abuse in Alexandria, VA, which has compiled a report entitled *Legislation Requiring Sex Offenders to Register with a Government Agency*.
2. Alaska State House of Representatives, Eighteenth Legislature (1993-94), First Session, House Bill Number 69, Section 1.
3. Harassment following community notification is further discussed in *Community Notification: A Survey of Law Enforcement*, Washington State Institute for Public Policy, November 1993.
4. For additional information on constitutional challenges to sex offender registration statutes, see *The Constitutionality of Statutes Requiring Convicted Sex Offenders to Register with Law Enforcement*, National Center for Missing and Exploited Children, January 4, 1994.
5. Excluding Tennessee, which passed but has not enacted a 1989 sex offender registration statute.
6. Edward J. Tolan, Chief of Police, Gorham, Maine, letter to Representative Anne Larrivee, Maine House of Representatives, March 4, 1992.
7. "Lawsuit: State Failed to Treat Sex Offender," *The Missoulian*, March 17, 1989.
8. Mea Andrews, "Child Killer Gets 200 Years," *The Missoulian*, March 8, 1988.
9. Telephone conversation with Representative Alice Ziegra, March 18, 1992.
10. Jon R. Conte et al., *An Evaluation of State Services to Victims of Sexual Assault*, Washington State Institute for Public Policy, June 1991.
11. Revised Code of Washington, 4.24.550(1).
12. For examples of community notification, see *Community Notification Press Review*, Washington State Institute for Public Policy, July 1992.
13. California Department of Justice, *Effectiveness of Statutory Requirements for the Registration of Sex Offenders*, 1988.
14. Telephone conversation with Susie Coon, Washington State Patrol, November 10, 1993.